United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

ORIGINAL

74-1911

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P/S

(101-E)

To be argued by
NORMAN J. LANDAU

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ROYAL STEUBING, 231 East Virginia Blvd., Jamestown, New York, CHAUTAUQUA COUNTY ENVIRONMENTAL DEFENSE COUNCIL, JOSEPH CATANIA, Drive-In Motel, Westfield, New York, ROBERT SEINDELL, 19 Chestnut Street, Jamestown, New York JAMESTOWN AUDUBON SOCIETY, MARTIN OQUIST, Greenhurst, New York, JACK LLOYD, Greenhurst, New York, RICHARD MUDGE, 49 Peleison Street, Jamestown, New York, TROUT UNLIMITED, ALAN REPPENHAGEN, Silver Creek, New York, CHAUTAUQUA COUNTY FEDERATION OF SPORTSMEN, CHARLES MOHNEY, Bemus Point, New York, CHAUTAUQUA LAKE POWER BOAT CLUB,

Plaintiffs-Appellees,

v.

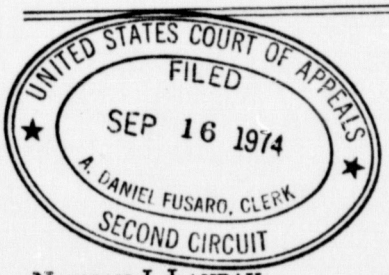
CLAUDE S. BRINEGAR, Secretary of Department of Transportation, 400 7th Street, S.W., Washington, D.C. 20590, RAYMOND T. SCHULER, Commissioner of New York State Department of Transportation, Albany, New York,

Defendants-Appellants,

THOM SHAGLA, *et al.*, 18 Merz Avenue, Bemus Point, New York, COUNTY OF CHAUTAUQUA,

Intervenors.

BRIEF FOR INTERVENORS TOM SHAGLA ET. AL COUNTY OF CHAUTAUQUA



NORMAN J. LANDAU
Attorney for Thom Shagla et al. and County of Chautauqua
233 Broadway
New York, N. Y. 10007
(212) WO 2-7545

NORMAN J. LANDAU
PAUL D. RHEINGOLD
Of Counsel

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Intervenors.

BRIEF FOR INTERVENORS

Preliminary Statement

This is an appeal by intervenors Thom Shagla et al. and the County of Chautauqua from an order of the Honorable John T. Curtin, United States Judge for the Western Dis-

trict of New York, dated May 20, 1974, which granted a preliminary injunction against further construction of a highway project in Chautauqua County. Defendant Raymond T. Schuler has filed a brief on appeal and defendant Claude S. Brinegar has filed a brief on appeal.

By order of this Court, dated August 12, 1974, motion to intervene in behalf of Thom Shagla et al. and the County of Chautauqua was granted by the Honorable James L. Oakes, Judge for the United States Court of Appeals, Second Circuit. Intervenors contend that the order of the Honorable John T. Curtin, United States District Judge for the Western District of New York, dated May 20, 1974, which granted a preliminary injunction against further construction of the bridge link-up at Lake Chautauqua was in error. The decision and order appealed from should be reversed. The complaint should be dismissed. In the alternative, the preliminary injunction should be dissolved.

Issue Presented

Did the Trial Court err in granting a preliminary injunction in failing to consider essential matters in the record, in making improper legal assumptions and in denying laches as a total and complete defense when the evidence was clear that laches existed? Did the Trial Court abuse its discretion by granting a preliminary injunction after a hearing confined to the question of laches?

Are defendants and Intervenors entitled to an immediate trial on the merits?

Decision Below

The District Court, on motion of the plaintiffs, confirmed the Report and Recommendation of the United States Magistrate sitting by order of reference as Special Master,

and granted a preliminary injunction as follows:

> "A preliminary injunction against further construction of the Chautauqua Lake Bridge (parcel '5C') pending compliance with N.E.P.A. shall issue forthwith. Defendants may complete the driving of the five test pilings. If other work is necessary to shut the project down while the necessary environmental impact study is being made, the defendants may move upon notice for further relief.
>
> "So ordered."

Statement of the Case

This is an appeal from the granting of a preliminary injunction against further construction of the Chautauqua Lake Bridge pending compliance with NEPA on behalf of all intervenors, Thom Shagla etal and the County of Chautauqua.

Based on a hearing before the Honorable Justice Edmund F. Maxwell, the Court held that plaintiffs probably would prevail on the merits and that they would suffer irreparable harm if the bridge project was completed. It is intervenor's contention that plaintiffs would not win on the merits nor would there be irreparable harm to the lake if the project was completed.

Justice Curtin, on page 17 of his opinion, refers to a December 16, 1970 letter (Exhibit S-5), "the ecology of Chautauqua Lake could be disrupted both during and after construction." Following this letter, plans and specifications were changed and on November 6, 1972, project approval was obtained from Terrance P. Curran, Director of Environmental Analysis of the New York State Department of Conservation (p. 131, Environmental Evaluation Supplement Report). The granting of this injunction

without a full environmental hearing or even an on-site inspection was in error.

464.6 million dollars (Transcript, p. 36), has been spent on this project including Appalachia Funding (Transcript, p. 19). The congressional intent was clear; to get the economy of Chautauqua County moving again since too many men were out of work. Lack of transportation and a modern expressway were found to be major contributors to the area's woeful economic plight.

Plaintiffs waited almost four years after NEPA's implementation to stop this work. They waited 15 months after completion of the demolition contract which included the removal of buildings and families from the demolition site. This demolition was completed in August, 1972.

If plaintiffs are finally successful in their efforts to stop this construction, we will have 250 miles of modern express four-lane highway with no middle link-up. This road will lead to nowhere. The Boces School whose site selection was based on the completion of the bridge link-up will require students to travel around the lake rather than make use of the bridge link-up (p. 132, Environmental Evaluation Supplemental Report), (Transcript, p. 98).

The congressional intent to lift the significantly undeveloped economic state of the area will be defeated if plaintiffs prevail. Major local private financial commitments have been made and facilities constructed in reliance upon the completion of this much needed highway. The Court below, in error, refused to consider this third-party reliance as a matter of law. These facilities, including a modern hotel, ski lodge and a sports complex employing several hundred people will suffer irreparable financial harm by the failure to complete this bridge project.

This case is unique because no previous one can be found which contains the following factors and our present result:

1. The Appalachian Regional Commission designated the Southern Tier Expressway for inclusion in the Appalachian Regional Development Act Highway Program, the congressional intent and the primary objective of the program being to promote the economic development of an area found by Congress to be significantly underdeveloped.

2. Federal approvals commenced in August, 1965 when the concept of this bridge was approved by the United States Bureau of Public Roads (Transcript, p. 13).

3. Newspaper advertisements invited the public to a hearing concerning various aspects of this bridge on November 12, 1965. The hearing was held on November 25, 1965 and the minutes were transcribed in accordance with Federal requirements (Transcript, p. 14).

4. The Policy and Procedures Manual 20-8 was satisfied on February 21, 1966 (Transcript, p. 17).

5. The Federal Highway Administration authorized preliminary plans to be drawn on May 31, 1966 (Transcript, p. 18).

6. Appalachia Regional Development Act inclusion was given March 9, 1966 (Transcript, p. 19).

7. The Federal Highway Administration approved the present location of this bridge on May 3, 1967 (Transcript, p. 20).

8. The Federal Highway Administration National Environmental Policy Act Guidelines dated November 30, 1970 were complied with (Transcript, p. 21).

9. The Federal Highway Administration approved the environmental re-evaluation on September 23, 1971 (Transcript, p. 21).

10. An updated environmental re-evaluation was approved by the Federal Highway Administration on April 16, 1973 (Transcript, p. 22).

11. 464.6 million dollars has been spent on the overall highway project (Transcript, p. 36).

12. New York State Department of Environmental Conservation has approved of the bridge project (p. 131, Environmental Re-Evaluation Supplemental Report).

13. The cost of temporary stoppage is great and will likely result in a permanent shut down of the job and the failure to complete this vitally needed express highway. Rerouting will take eight years, will make the highway longer and more expensive (Transcript, p. 138).

14. Demolition at the bridge site was completed in August, 1972 including earth moving, tree removal, home demolition and family relocation.

15. Raymond International has a contract on the bridge amounting to 14.7 million dollars (Transcript, p. 105).

16. Two-thirds of the operating engineers, approximately 1,600, are unemployed in the Chautauqua County area. These engineers have lost a 7 million dollar payroll over a 60 week period as a result of the shut down of this job (Transcript, pp. 40, 41, 139).

17. Teamsters, carpenters, cement masons, pile drivers as well as iron workers have felt a severe financial impact from the shutdown of this job (Transcript, p. 147).

ARGUMENT

POINT I

The Trial Court erred in granting a preliminary injunction in that it failed to consider essential matters in the record, made improper legal assumptions, and abused its discretion in sustaining the defense of laches.

A.

In this argument, intervenors concede that (a) the lower court had the power to grant an injunction if the record warranted it; and (b) that an impact statement (Enviornmental Impact Statement) was possibly required but not in existence. It is our contention, however, that the Trial Court erred in granting the preliminary injunction for the following reasons:

1. There was such substantial compliance with the Environmental Impact Statement requirements that it was apparent that plaintiffs lacked a reasonable probability of success.

2. Other remedies less drastic than an injunction were available and should have been used.

3. The court failed to balance the considerations and equities between the parties below and third parties (intervenors) who had made substantial reliance on the construction of the bridge.

4. There was virtually no evidence in the record of substantial amounts of irreparable damage yet to be done in the construction work.

5. There was evidence, clear beyond doubt, that the plaintiffs had unreasonably and unnecessarily delayed in

asserting their demand for an injunction at least eighteen months while demolition and construction proceeded.

6. The court below failed to give any consideration to the fact that good faith was shown on the part of the government.

7. The court below defeated the Congressional intent when it failed to consider the Appalachian Regional Development funding aspects of this project and granted an injunction.

B.

The granting of a preliminary injunction is to be evaluated and reviewed on the standards of preliminary injunctions generally and there is no special considerations to be given merely because an environmental issue is involved. Nothing in the National Environmental Policy Act specifically grants to the courts the power to issue preliminary or final injunctions; rather that power arises from Rule 65 FRCP in dealing with allegations that the Environmental Impact Statement provisions of National Environmental Policy Act have not been complied with.

> *Canal Authority of the State of Florida* v. *Calloway,* 489 F. 2nd 567 (1974).

It has also been held that the courts have no extra powers just because an environmental issue is presented to it. Chief Justice Burger, denying an application for a stay, stated recently:

> "Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmentl damage' is asserted.

"The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation. The decisional process for judges is one of balancing and it is often a most difficult task."

Aberdeen & Rochester RR Co. v. *S.C.R.A.P.*, 409 U.S. 1207 at 1218 (1972).

An injunction need not necessarily be issued to enforce an Environmental Impact Statement required by the National Environmental Policy Act.

Sierra Club v. *Mason*, 365 Fed. Supp. 47 (D.Conn. 1973).

C.

In granting injunctions, courts must consider the interests of all parties and must balance the equities reflected by the various parties.

A finely tuned balancing of the economic, social and environmental factors is mandatory prior to granting an injunction. This has been stated in enivronmental injunction cases.

State of Ohio ex rel. Brown v. *Calloway*, 497 F. 2nd 1235 (6th Cir. 1974); affirming (S.D. Ohio 1973);

Sierra Club v. *Hickel*, 433 F. 2nd 424 (9th 1970) aff'd *sub nom. Sierra Club* v. *Morton*, 405 U.S. 727;

Environmental Defense Fund, Inc. v. *Froehlke*, 368 F.Supp. 231 (W. D. Mo. 1973);

Citizens Committee for Hudson Valley v. *Volpe*, 297 F. Supp. 807 (S.D.N.Y. 1969);

E.D.F. Inc. v. *T.V.A.*, 492 F. 2nd 466 (6th Cir. 1974).

Certainly part of the consideration in these balanced scales is the damages to the defendants themselves. Where, as in this instance, the defendants will be injured financially to a great extent, then this is a matter for the Court to consider. $464 million has been spent on two portions of a highway totalling 250 miles; it will contain a one mile gap if the bridge is not completed thus defeating the entire highway concept. There is no evidence in the findings below that any consideration was given to this factor.

In *Association of Northwest Steelheaders* v. *U. S. Army Corps of Engineers,* 485 F. 2nd 67 (9th Cir. 1973), the Court referred to the consideration of whether enjoining the project would "work an intolerable burden on governmental functions which outweighed any private harm". At p. 70.

In *Environmental Defense Fund, Inc.* v. *Armstrong,* 352 F. Supp. 50 (N.D. Col. 1972) where no Environmental Impact Statement had been filed yet, the Court refused a preliminary injunction after it balanced the equities.

The Court in *Armstrong* presents a reasoned argument on this point buttressed by citations:

> "Under the circumstances, a proper balancing of the factors to be considered under general principles of equity requires that the substantial costs incident to the suspension of work should be avoided while the EIS is being revised. Accordingly, jurisdiction will be maintained to make certain that the schedule adopted is fully complied with.
>
> Plaintiff Environmental Defense Fund argues that, as a matter of law, once an EIS is found deficient in some respect, however slight, work on that project must be enjoined forthwith. We disagree. Nothing in the NEPA, its legislative history, or the cases indicates that the Court is to be thus restricted from exer-

cising its equity powers to fashion a decree meeting the needs of the particular case before the Court.

In *Daly* v. *Volpe,* 326 F.Supp. 868 (W.D.Wash. 1971), the Court found that there had not been strict compliance with NEPA, but weighing the possible injury to the citizens of the community and the state against those likely to be sustained by plaintiffs as a result of non-compliance, the court refused to enjoin work on the project. Other instances of the courts' exercise of their equity powers under the NEPA are found in *Sierra Club* v. *Hickel,* 433 F.2d 24 (9th Cir. 1970); *Conservation Council* v. *Froehlke,* 348 F.Supp. 338 (W.D.C. Cir. 1972); *Environmental Defense Fund* v. *Froehlke,* 348 F.Supp. 338 (W.D.Mo. 1972) and *Scrap* v. *United States,* 346 F.Supp. 189 (D.C.D.C. 1972).

In order to obtain preliminary injunctive relief, plaintiffs must demonstrate that (1) they will suffer immediate and irreparable injury if the injunction is not granted, *United Fuel Gas Co.* v. *Railroad Comm. of Kentucky,* 278 U.S. 300, 49 S.Ct. 150, 73 L.Ed. 390 (1929); See also *Environmental Defense Fund* v. *Hardin,* 325 F.Supp. 1401 (D.C.D.C. 1971); and (2) that they are likely to prevail on the merits, *Ohio Oil Co.* v. *Conway,* 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972 (1929). Failing this, it is still within the Court's discretion to grant injunctive relief if it is felt that a balancing of the equities so requires."

The Court below failed to balance the environmental and economic equities (App. A, *infra* p. 1A).

The contract with Raymond International for the construction of the bridge is $14.7 million (Transcript, p. 105). Failure to complete the construction will expose the government to a damage suit; delay will likewise increase the cost of construction. Meanwhile, many additional people are out of work in the Jamestown, Chatauqua County area.

There is no evidence in the findings below that any consideration was given to these factors. On the contrary, the court said on page 18 of its decision, "The court refuses, as a matter of law, to give weight to either the total highway project or the private reliance upon the bridge's completion".

D.

The Court below failed to give any consideration to the fact that the defendants have been acting in good faith. A general principle of equity is that a bona fide of the parties is to be considered. 42 Am. Jur. Injunctions § 340.

Addressing ourselves first to the clean hands and good faith of the plaintiffs, we note first their delay in bringing the present action. While this may not be catalogued as laches, nonetheless they delayed until almost all the scenic damage ever to be done was completed before suit was commenced. The demolition contract was let in May of 1972 and completed in August 1972 and plaintiffs waited eighteen months from the letting of the demolition contract to bring this action (Transcript, p. 59).

There is absolutely nothing in the record to suggest that the Federal Government or the State of New York or any of the agencies involved were proceeding without clean hands and good motives.

> *Environmental Defense Fund, Inc.* v. *Froehlke,* 348 F. Supp. 338, aff'd 477 F. 2d 1033 (8th Cir. 1973).

This highway system and the bridge represent a congressional decision to benefit a large segment of the public by providing it with a much needed modern express highway system. The Appalachian Regional Program aspects of this Southern Tier Expressway was never explored in the hearing below.

E.

The rights of third parties and the hardships upon them are a necessary consideration in the granting of an injunction.

The state built the Boces School in substantial reliance on the completion of the bridge (Transcript, pp. 96 to 98). Niagara Mohawk Power Corp. acted in reliance on completion of the bridge (Transcript, pp. 162-163). A substantial amount of local private funds was invested in Peek 'n Peak Recreation, Inc. (Transcript, pp. 227-234) employing some 330 local residents. These all constitute third party reliance on the completion of this project.

The court below, refused as a matter of law, to consider third party reliance. In this the court erred.

> 7 Moore, Federal Procedure, p. 65-136, sec. 65.18(3);
> 42 Am. Jur. 2d Injunctions § 56.
> See generally Vol. 7. Moore, pp. 65-140 § 65-18(3); 42 Am Jur 2d Injunction, § 59.

In environmental injunction cases, courts have looked into the effects of granting an injunction upon third parties who have relied upon the proposed or commenced construction, and as to the rights and the hardships which may accrue if said construction is ceased.

> *State of Ohio ex rel. Brown* v. *Calloway,* 497 F. 2nd 1235 (6th Cir. 1974) aff'd 364 F. Supp. 296 (D. Ohio 1973);
> *Citizens Committee for the Hudson Valley et al.* v. *Volpe,* 297 F. Supp. 804 (S.D.N.Y. 1969).

In holding that plaintiffs were not barred by laches, the court abused its discretion. Laches is as good a defense to a proceeding under the National Environmental Policy

Act as in any equitable proceeding, since in every case the question is whether the plaintiff so slept upon his rights as to cause damage to the defendants.

Clark v. *Volpe,* 342 F. Supp. 1324, aff'd 461 F. 2d 1266 (5th Cir. 1972);
Centerview v. *Brinegar,* 367 F. Supp. 633 (C.D. Cal. 1973);
Pennsylvania Environment Council v. *Bartlett,* 315 F. Supp. 238, aff'd 454 F. 2d 613 (3rd Cir. 1971);
Ward v. *Ackroyd,* 344 F. Supp. 1202 (DMD 1972).

Plaintiffs reside near the bridge construction site. They have a clear unobstructed view of the highway proceeding through its various stages up through and including the demolition contract which took down the trees, moved the houses and moved the mounds of earth which an on site inspection by counsel for intervenors appeared to be enormous.

From 1965 when the preliminary location plans approved the bridge concept to the last of November 1973 when the demolition at the bridge site had been completed 15 months, then, and only then, did plaintiffs with full knowledge and with full view of the tremendous work in progress, only then did they bring this action to stop the job: 8 years after published notice of hearings concerning this bridge construction (Transcript, p. 14); 7 years after preliminary plans were authorized by the Federal Highway Administration in conformance with their policy and procedure memorandum 20-8 (Transcript, p. 18); 7 years after the project was included in the Appalachian Regional Development Program (Transcript, p. 19); plaintiffs waited 6 years after the Federal Highway Administration approved the present location of the bridge (Transcript, p. 20); plaintiffs waited 2 years and 2 months after the Federal Highway Administration approved the environmental evaluation which was done in accordance with

the National Environmental Policy Act guidelines dated November 30, 1970 (Transcript, p. 21); plaintiffs waited 18 months after the demolition contract was let to commence their action (Transcript, p. 24); plaintiffs waited 15 months after demolition was completed in August 1972 to commence this action.

Bearing in mind that the plaintiffs living in close proximity to the construction site could see the construction progressing, could hear the sounds of the heavy equipment at work and could feel the rumbling of the earth when the huge earthmoving equipment completed the approach holes for the bridge, which appear to be large enough to swallow up a full size 6-story apartment building, during all of this the plaintiffs were inactive. They waited until the end of November 1973 to commence this action. Plaintiffs are guilty of laches as a matter of law and their complaint should be dismissed.

F.

There was no credible evidence to support a necessary finding for an injunction that irreparable damages would be done if the project were allowed to continue.

A finding of irreparable damages is, of course, an absolute necessity for the granting of an injunction. If such damage will not occur, then while the conduct may be actionable, remedies at law will satisfy.

42 Am Jur 2d Injunction § 48.

This has also been held in many environmental injunction cases.

Adverse impact on the environment is not to be equated with irreparable damage. *Canal Authority* v. *Calloway, supra.*

The court erred in several respects in making its finding that irreparable damage would occur:

1. The court relied on the letter of Jeffrey A. Lane, Program Associate to Commissioner Parker of NYDOT, expressing the fear of ENCON that "the ecology of Chautauqua Lake could be disrupted both during and after construction . . ." (149A). That letter was dated December 16, 1970. That letter is a far cry from the proof required of "irreparable harm" which would necessitate the granting of injunctive relief.

A January 6, 1971 letter by Mr. Lane expresses concern of spoil removal methods, siltation, and means of mitigation (Exhibit S-5 Environmental Re-evaluation).

These letters were referred to in the decision below both on the count of probability of success on the merits of the plaintiff (p. 13) and on the showing of irreparable harm (p. 17). No way does the Court below acknowledge the subsequent letter of Terrence P. Curran, the Director of Environmental Analysis, dated November 6, 1972, which reviews the project's revised contract specifications and the class A water quality standards and concludes, "We concur with the revised contract specifications and, therefore, we approve of this project as it is presently proposed (Exhibit S-6 Environmental Re-evaluation p. 131).

2. When the project as a whole is viewed, most of the damages ever to be done to the environment was done, and very little additional damage was reported to be in the offing according to the weight of the testimony received by the master.

In a case of this sort, where the project has begun and very little additional damage will occur if it is completed, even though there was no compliance with the Environmental Impact Statement requirements, nonetheless it was not proper to grant an injunction.

Clark v. *Volpe,* 342 F. Supp. 1324, aff'd 461 F. 2d 1266 (5th Cir. 1972);
Movement Against Destruction v. *Volpe,* 361 F. Supp. 1360 (D. Md. 1973);
ECOS v. *Volpe,* 486 Fed. 2d 1399 (4th Cir. 1973);
Citizens for Mass Transit Against Freeways v. *Brinegar,* 357 F. Supp. 1269 (D. Ariz. 1973);
(See footnote 10 at 1271).

What the just cited hold, when analyzed together, is that even if there is a National Environmental Policy Act violation alleged and likely to be proved, the injunction is not necessarily the proper remedy. In fact, where the work is substantially done, the courts may properly allow it to be wound up pending the arrival of the Environmental Impact Statement. Assuming, for the sake of discussion, that the work is completed and then no satisfactory compliance with the National Environmental Policy Act is ever achieved, the Court still has a number of remedies available to it, including damages and tearing the work down.

ECOS v. *Volpe,* 486 F. 2nd 1389 (4th Cir. 1973).

G.

Plaintiffs lacked a reasonable probability of success.

It is of course a hallmark of the granting of a preliminary injunction that the plaintiffs have a reasonable probability of success.

On the record as it was available to the lower court, there was insufficient evidence to support a finding that plaintiffs would prevail at an eventual trial on the merits.

Experience in many National Environmental Policy Act decisions has shown that almost invariably the agency involved is able to come up with a satisfactory Environmental Impact Statement. The question is merely whether or not the agency puts out a statement touching all of the statutory bases.

See *Life of the Land* v. *Brinegar*, 485 F. 2nd 460 (9th Cir. 1973).

In this case, the state DOT may be a party capable of creating for the Federal DOT the required Environmental Impact Statement at least where the record is as it is in the present case (App. A, *infra*, p. 17A).

Iowa Citizens for Environmental Quality Inc. v. *Volpe*, 487 F. 2d 849 (8th Cir. 1973).

The state DOT has itself, as shown in the record below, done an environmental re-evaluation, touching most, if not all, of the points in the National Environmental Policy Act (Appendix 17A). This review showed that the project should continue and that environmental damage was minimal and outweighed by the need for the road. Certainly the environmental reevalution of some 178 pages as well as the prior 305 page statement proves the government was in substantial compliance.

If "reasonable chance of success" refers to the issue presented on an immediate trial as to whether or not in fact there has been compliance with the National Environmental Policy Act requirement, then we wish to point out that the state report, mentioned above, may well be held by the Trial Court to constitute substantial compliance with the National Environmental Policy Act requirement. That being so, the plaintiffs may be expected to lose in both the short run and the long run.

Precedents have held that substantial compliance with Environmental Impact Statement requirements is all that is required in the presence of the fact that the project is far advanced.

ECOS v. *Volpe*, —— F. Supp. —— 5 ERC 1019, 486 F. 2d 1399 (4th Cir. 1973);

Green County Planning Board v. *FPC*, 455 F. 2d 412 cert. denied 409 U.S. 849 (2d Cir. 1972); *Environmental Defense Fund, Inc.* v. *Froehlke*, 348 F. Supp. 338, aff'd 477 F. 2d 1033 (8th Cir. 1973).

POINT II

The action should be dismissed on the basis of laches. Aside from any issues dealing specifically with the Preliminary Injunction, the action should be dismissed entirely on the ground that defendants presented below a total defense to the action, laches, on which there was substantial evidence of its presence in this case. This Point is briefed fully in Point I F., *supra*.

POINT III

In any case the defendants and intervenors should be granted an immediate trial on the merits.

CONCLUSION

The decision and order appealed from should be reversed. The complaint should be dismissed. In the alternative, the preliminary injunction should be dissolved.

Should this court refuse to grant the relief above requested, then the case should be remanded for an immediate trial on the merits.

Even if preliminary injunction was proper on the present state of the record, the trial court may refuse a permanent injunction after a trial on the merits be-

cause of substantial compliance with NEPA and the tremendous economic loss to the government and third party intervenors if the project is not completed.

Dated: September 16, 1974.

Respectfully submitted,

NORMAN J. LANDAU
Attorney for Intervenors

RICHARD J. LIPPES, Esquire
800 Western Building
Buffalo, New York 14202

DOUGLAS DALE, Esquire
Office of the Attorney General
Albany, New York 12224

JOHN T. ELFVIN, Esquire
United States Attorney
Buffalo, New York 14202

Attention: C. DONALD O'CONNOR, Esquire
Assistant United States Attorney

EDMUND B. CLARK,
EVA R. DATZ,
Attorneys, Department of Justice
Washington, D. C. 20530

INTERVENORS' APPENDIX

Exhibit A.

Defendants request the Court to make the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The general route of the Southern Tier Expressway, as defined by Highway Law, § 340-c, in 1962, runs from the Broome-Tioga County Line westerly to the Pennsylvania State Line, in the area of Erie, Pennsylvania.

2. The sections at issue in Chautauqua County are designated as follows, running from west to east:

a) "5A"—Pennsylvania State Line to Sherman, 9.0 miles;

b) "5B"—Sherman to Stow, 10.0 miles;

c) "5C"—Stow to Bemus Point, 1.4 miles;

d) "5D"—Bemus Point to Strunk Road, 6.1 miles.

3. Section "5C" includes a bridge spanning Chautauqua Lake from Stow to Bemus Point, which concept was approved by the Bureau of Public Roads (BPR) on August 17, 1965 (S.M. 13; Exhibit S-2, Appendix "B").

4. On October 14, 1965, BPR approved the Preliminary Location Plans and authorized the inclusion of the bridge as part of the presentation to be made at a hearing on November 23, 1965, at the Jamestown Community College (S.M. 13, 14; Exhibit S-2, Appendix "A").

5. Prior to the hearing's being held, advertisements were placed in the Jamestown Journal on November 12 and 19, 1965 (S.M. 14).

Exhibit A.

6. The public hearing was held on November 23, 1965, at the Jamestown Community College and the minutes thereof transcribed (S.M. 14; Exhibit S-3).

7. At the public hearing, twenty-five persons made oral statements (S.M. 15; Exhibit S-3).

8. At the hearing, two sets of maps were presented to the audience, one showing the project in a 1″ = 2,000′ scale (S.M. 16; Exhibit S-4a) and the other showing the project in more detail in a 1″ = 200′ scale (S.M. 16; Exhibit S-4b). Both maps show a proposed bridge across Chautauqua Lake (S.M. 16, 17).

9. On February 21, 1966, BPR approved the transcript of the public hearing, Exhibit S-3, as satisfying the requirements of Policy and Procedure Memorandum (PPM) 20-8 (S.M. 17; Exhibit S-2, Appendix "C").

10. On March 9, 1966, the Appalachian Regional Commission designated the Southern Tier Expressway for inclusion in the Appalachian Regional Development Act highway program (S.M. 18, 19).

11. The primary objective of the Appalachian Regional Development Act highway program is to promote the economic development of areas found by Congress to be significantly underdeveloped (S.M. 213; 40 U.S.C., App., § 2).

12. The Appalachian Regional Commission's approval of the corridor included the bridge spanning Chautauqua Lake (S.M. 214-222; Exhibits S-19; S-20a; S-20b; S-21).

13. Pursuant to the Appalachian Regional Development Act, 40 U.S.C., App., § 201, the Secretary of Transportation is authorized and empowered to assist in the construc-

tion of Appalachian Regional Development Act highway programs, consistent provisions of Title 23 U.S.C. being made applicable thereto.

14. On May 31, 1966, authorization was obtained from BPR to prepare preliminary design plans on Section 5C (S.M. 18; Exhibit S-2, Appendix "D"; Exhibit F-1, para. 11, IX).

15. On May 3, 1967, the Federal Highway Administration (FHWA), formerly BPR, approved the present location of the bridge (S.M. 20; Exhibit S-2, Appendix "E"; Exhibit F-1, para. 15, XIII).

16. Design approval for Section 5C was given by FHWA on October 31, 1968 (S.M. 276, 277; Exhibit F-1, para. 17).

17. On July 16, 1969, FHWA determined that all applicable requirements of PPM 20-8, relating to public hearings, had been satisfied and that no further hearings were required (Exhibit F-1, para. 18, XV).

18. On March 30, 1970, FHWA authorized the New York State Department of Transportation (NYDOT) to proceed with the acquisition of right of way in connection with Section "5C" (Exhibit F-1, para. 20, XVII).

19. Right of way acquisition began on Section "5A" in August 1968; on Section "5B" in August 1969; on Section "5C" in October 1969; and on Section "5D" in January 1969 (S.M. 55, 56).

20. On September 23, 1971, FHWA approved an environmental reevaluation of Section "5C", advising NYDOT that no further environmental action would be required, in accordance with FHWA Draft Instructional Memorandum,

dated November 24, 1970, and FHWA NEPA guidelines, dated November 30, 1970, which preceded FHWA's PPM 90-1, issued on August 24, 1971 (S.M. 20, 21; Exhibits S-2, Appendix "H"; F-1, para. 29, XXIV, XXVI; S-5).

21. On May 24, 1972, FHWA granted PS&E approval for two demolition contracts encompassing Sections "5B", "5C" and "5D" (S.M. 59; Exhibit F-1, para. 31, XXVIII).

22. Contracts were awarded for demolition of buildings in connection with Sections "5B", "5C" and "5D" in June 1972 and the work completed by August 25, 1972 (S.M. 59; Exhibits S-10A, S-10B).

23. On April 16, 1973, FHWA approved a supplemental reevaluation of Project "5C" (S.M. 22; Exhibits S-2, Appendix "I"; S-6; F-1, para. 33, 34).

24. Construction of the bridge was planned in three phases, demolition of structures within the approaches on either side of the lake, completed by August 25, 1972, construction of the substructure and construction of the superstructure (S.M. 22-24).

25. On May 9, 1973, FHWA granted PS&E approval for construction of the bridge substructure (S.M. 28; Exhibit S-2, Appendix "J").

26. On July 9, 1973, a contract was awarded to Raymond International, Inc., for construction of the bridge substructure (S.M. 27, 28; Exhibit S-2).

27. At the hearing held January 17 and 18, 1974, Donald H. Ketchum, Region 5 Director, NYDOT, testified to the following State expenditures on the Southern Tier Ex-

pressway to date (S.M. 29-36):

	Region 5	*Region 6*	*Total*
Preliminary Engineering	$ 9.3 m.	$ 13.7 m.	$ 23.0 m.
Construction Costs	156.0 m.	228.0 m.	384.0 m.
Right of Way Costs	23.4 m.	34.2 m.	57.6 m.
Totals	$188.7 m.	$275.9 m.	$464.6 m.

* * * * * *

29. From July 9, 1964 to December 7, 1972, there were approximately twenty informal meetings with interested individuals and groups in connection with Section "5C" (S.M. 43-46; Exhibit S-7).

30. Plaintiff Steubing attended some of the informal meetings contained in Exhibit S-7.

31. From February 1966 to December 1973, at least seventy-five newspaper articles were printed in connection with Section "5C" (S.M. 46-50; Exhibit S-7).

32. The newspaper articles contained in Exhibit S-7 appeared in the Dunkirk Evening Observer, the Buffalo Courier Express, the West Olean Times Herald, the Jamestown Post Journal, the Grape Belt, the Tonawanda News and the Salamanca Republican Press (S.M. 47).

33. At least two of the newspaper articles contained in Exhibit S-7 were written by plaintiff Jack Lloyd (S.M. 47).

34. The newspaper article by plaintiff Jack Lloyd dated April 4, 1972 describes the fact that NYDOT had prepared a reevaluation of the Section "5C" project in lieu of an environmental impact statement, which procedure had been accepted by FHWA (S.M. 48; Exhibit S-7, p. 69).

Exhibit A.

35. On August 21, 1972, three of the named plaintiffs sponsored a full page advertisement which ran in at least one local newspaper, the Dunkirk Evening Observer, entitled "Stop the Bridge to Nowhere" (S.M. 49; Exhibit S-8).

36. On November 18 and 25, 1965, NYDOT published legal notices in two newspapers announcing the opportunity for public hearings in connection with Sections "5A" and "5B", as required by FHWA procedures (S.M. 50-52).

37. No requests for a public hearing were received in connection with Sections "5A" and "5B" (S.M. 52; Exhibit S-9).

38. The State acquired the following parcels of property for right of way purposes (S.M. 58, 59):

Section	*Parcels*	*Buildings*	*Families Affected*	*Business Affected*
"5A"	38	14	5	0
"5B"	95	96	22	1
"5C"	63	59	20	1
"5D"	142	79	24	4
Total	338	248	71	6

39. There were 43 buildings removed on the west side of Chautauqua Lake in the area of the bridge approach in connection with the demolition contract referred to as Exhibit S-10A (S.M. 60).

40. There were 30 buildings demolished on the east side of Chautauqua Lake in the area of the bridge approach in connection with the demolition contract referred to as Exhibit S-10B (S.M. 61, 62).

Exhibit A.

41. There were a total of 244 structures demolished within the State's right of way, including the 73 structures razed under the two demolition contracts, the remaining structures having been removed with State forces (S.M. 62, 63).

42. The bulk of the buildings removed were shoreline properties visible from the lake and from the mainland (S.M. 65, 66).

43. NYDOT maintained a relocation assistance office opposite Bemus Point from December 1970 to March 1973 with a prominent sign on the building (S.M. 66).

44. Exhibits S-11 and S-12 contain correspondence requesting information from NYDOT and the New York State Department of Environmental Conservation (ENCON) with respect to environmental impact statements in connection with Section "5C" and the responses thereto during the period from March 17, 1966 through March 11, 1972 (S.M. 67-70).

45. The correspondence contained in Exhibits S-11 and S-12 includes requests for information by plaintiffs Chautauqua County Federation of Sportsmen, Inc., and Chautauqua County Environmental Defense Council (S.M. 67-70).

46. Plaintiffs Steubing and Chautauqua County Environmental Defense Council began investigating the background involving Section "5C" in 1970 (S.M. 288, 289).

47. One of the first steps taken by plaintiffs Steubing and Environmental Defense Council was to examine plans of the project in the office of the Chautauqua County Planner (S.M. 289).

Exhibit A.

48. Plaintiff Steubing requested meetings with NYDOT personnel in March 1972 to discuss environmental factors, at which meetings the NYDOT representatives discussed with concerned citizens the status of the project, the cost, the need for an environmental impact statement and the steps to be taken to prohibit ecological damage (S.M. 290, 291).

49. Plaintiff Steubing was specifically advised in March 1972 by NYDOT officials that the State had been required by FHWA to prepare an environmental reevaluation (Exhibit S-5) for Section "5C", in lieu of an environmental impact statement (S.M. 293, 299).

50. Plaintiff Steubing was familiar with the meaning of the term "environmental impact statement" from his meetings with other environmental groups (S.M. 298).

51. Plaintiffs knew in March 1972 NYDOT's and FHWA's view with respect to an environmental reevaluation's satisfying the requirements of NEPA in lieu of an environmental impact statement (S.M. 299, 300).

52. Plaintiffs were informed by the Environmental Protection Agency (EPA) in June 1972 that an environmental reevaluation had been prepared in late 1971 by NYDOT as an FHWA requirement and that the outcome of the reevaluation was a determination that the environment would be adequately protected, thus requiring no environmental impact statement (Exhibits F-2; F-3).

53. Since notice to the State on November 30, 1973 of the commencement of this litigation, NYDOT has taken steps to curtail the work of the contractor on Section "5C" to the

extent possible without causing damage to the environment or creating hazardous conditions (S.M. 71-79).

54. At the request of the Attorney General's office, NYDOT prepared an estimate of the cost to the State of delaying the construction on Section "5C" from December 1, 1973 to June 1, 1974, period of seven months (S.M. 80-85).

* * * * * *

56. At the request of the Attorney General's office, NYDOT prepared an estimate of the cost to the State if the contract on Section "5C" were cancelled and subsequently relet (S.M. 86-88).

* * * * * *

58. There is an additional internal cost to the State of approximately $20,000 to $30,000 for advertising and reletting the contract (S.M. 91).

59. At the request of the Attorney General's office, NYDOT prepared an estimate of the cost to the State of abandoning that portion of the Southern Tier Expressway from the Pennsylvania State Line to Bemus Point (S.M. 91-93).

* * * * * *

61. Construction activity on Section "5C" has already resulted in substantial alteration of the environment. The trees (S.M. 98, 99) and buildings (S.M. 62, 63) that are to be removed on both sides of the lake have been removed, stripping and grubbing has been done (S.M. 117) and unstable soil on shore has been excavated for replacement with more stable material (S.M. 72-73). In the lake most of the dredging has been completed (S.M. 117). There was

also channel relocation work (S.M. 117) and a test pile has been driven (S.M. 76).

62. Since August 1973, the contractor has employed the following average number of men per day (S.M. 95, 96):

August 1973—27
September 1973—38
October 1973—58
November 1973—46
December 1973—44

63. It is estimated that the contractor will employ an average of 160 men per day beginning in June 1974 (S.M. 96).

64. Richard G. Chaffee, Business Manager for Operating Engineers Local 17, testified to the estimated lost payroll that would result to members of that union where the Section "5C" and "5D" projects to be halted (S.M. 139-146).

65. Mr. Chaffee estimated for his union an average weekly payroll of $20,000 on Section "5C" during the peak construction seasons (S.M. 142).

66. Mr. Chaffee estimated for his union an average weekly payroll of $114,000 on Section "5D" during the peak construction seasons (S.M. 146).

67. A BOCES school was erected in 1969 on the Stow side of Chautauqua Lake in reliance on the anticipated completion of the bridge spanning the lake from Stow to Bemus Point (S.M. 96-98; Exhibit S-13).

68. Niagara Mohawk Power Corporation has begun construction of a service center facility at Stow at a cost of

$400,000, in reliance on the anticipated completion of the bridge spanning Chautauqua Lake from Stow to Bemus Point (S.M. 152-167).

69. Niagara Mohawk Power Corporation contracted to sell a portion of its old service center in Falconer to the municipal electrical company in Jamestown in reliance on the eventual completion of Section "5C" (S.M. 162, 163).

70. Peek'n Peak Recreation, Inc., operator of a ski area in the Town of French Creek, in Chautauqua County, after a feasibility study undertaken in 1970 and 1971 costing between $80,000 and $100,000, raised $1.5 m. by a public offering of its stock and $2.5 m. by commercial bank loans in order to embark upon an expansion program (S.M. 227-234).

71. The stock sale initiated by Peek'n Peak Recreation, Inc., was accompanied by a prospectus, approved by the Securities & Exchange Commission, showing, by way of a map included therein, the Southern Tier Expressway and the Chautauqua Lake Bridge (S.M. 233-236).

72. The anticipated completion of the Southern Tier Expressway and the Chautauqua Lake Bridge was the primary factor in the expansion program undertaken by Peek'n Peak (S.M. 235-237).

73. The capital raised by stock sale and bank loan has been used to construct a sewer plant, a water distribution system, an 18 hole golf course, two indoor tennis courts, an indoor swimming pool, sauna and exercise facilities, and a 600 room inn with dining facilities, lounges and convention rooms, which have been open since October 1, 1973 (S.M. 237, 238).

Exhibit A.

74. The success of the Peek'n Peak expansion facilities is dependent upon the completion of the Southern Tier Expressway and the Chautauqua Lake Bridge (S.M. 238, 244, 246).

75. Peek'n Peak has purchased an additional 800 acres of land in anticipation of additional expansion of its facilities to create a year round recreational center (S.M. 240, 241).

76. The Urban Area Planning Board of Southern Chautauqua County, in conjunction with the Chautauqua County Planning Board, developed comprehensive plans for the region and for each of the fourteen participating municipalities, beginning in 1966 and culminating in 1971 (S.M. 172-188; Exhibits S-14a; S-14b; S-15a; S-15b; S-16a; S-16b).

77. The Southern Tier Expressway, generally, and the Chautauqua Lake Bridge, particularly, were the critical elements in the planning for the comprehensive plans promulgated by the Urban Area Planning Board of Southern Chautauqua County (S.M. 179).

78. Copies of the comprehensive plans promulgated by the Urban Area Planning Board were available for public inspection (S.M. 181, 187).

79. The meetings of the Urban Area Planning Board and of the individual municipal planning boards were open to the public (S.M. 190, 195).

80. The Urban Area Planning Board promulgated in July 1970 a report entitled "Chautauqua Lake Study",

predicated upon the eventual construction of the Southern Tier Expressway and the Chautauqua Lake Bridge (S.M. 188-192; Exhibit S-17).

81. The "Chautauqua Lake Study" was distributed publicly and was available for public inspection (S.M. 192).

82. NYDOT published a report, in October 1970, entitled "Jamestown Transportation Study", based upon input from NYDOT sources and the Urban Area Planning Board. The report includes the Chautauqua Lake Bridge concept (S.M. 192-194; Exhibit S-18).

83. The "Jamestown Transportation Study" was available for public inspection (S.M. 194).

84. The Chautauqua County Legislature, by resolution dated November 8, 1972, after debate, endorsed the completion of the Southern Tier Expressway, including the bridge spanning Chautauqua Lake (S.M. 197, 198; Exhibit S-2, Appendix "K").

85. In January 1968, the New York State Office of Planning Services (OPS) published the "New York State Appalachian Program Development Plan", as required by the Appalachian Regional Development Act, 40 U.S.C., App. (S.M. 212; Exhibit S-19).

86. Exhibit S-19 includes a map showing the Southern Tier Expressway corridor and the bridge spanning Chautauqua Lake (S.M. 214).

87. Exhibit S-19 was a public document, distributed throughout the Appalachian region, and was freely available to the public (S.M. 215, 216).

Exhibit A.

88. In January 1971, OPS published "New York State Development Plan One", to be used as a functional planning guide by State agencies and by planning bodies of political subdivisions (S.M. 216, 217; Exhibit S-20a; S-20b).

89. Exhibits S-20a and S-20b include as part of the development plan the Southern Tier Expressway corridor and the bridge spanning Chautauqua Lake (S.M. 218).

90. Approximately 8,000 copies of Exhibit S-20a and S-20b were distributed together with press releases announcing the public availability thereof (S.M. 219, 220).

91. In January 1971, OPS published a "New York State Appalachian Development Plan", Exhibit S-21, which represented an updating of Exhibit S-19 (S.M. 220-222).

92. Exhibit S-21 included as part of its planning process the Southern Tier Expressway and the Chautauqua Lake Bridge (S.M. 222).

93. Approximately 2,500 copies of Exhibit S-21 were distributed, 1,000 copies within the Appalachian counties of New York, and were freely available to the public (S.M. 222, 223).

CONCLUSIONS OF LAW

I. Plaintiffs had notice at least as early as March 22, 1972 that the State had prepared an environmental reevaluation on Section "5C" in lieu of an environmental impact statement in full compliance with FHWA procedures in effect at that time (S.M. 292, 297-300; Exhibits S-7, S-11; F-2, F-3).

Exhibit A.

II. Plaintiffs could have commenced this action prior to the granting of the first PS&E approval on Section "5", which occurred on May 24, 1972 [Exhibit F-1, para. 31; *Monroe County Conservation Council, Inc.* v. *Volpe,* 472 F. 2d 693 (1972)].

III. Private and public commitments have been made in reliance on the completion of the Chautauqua Lake Bridge.

IV. The cost to the State of New York of abandoning Section "5C" would be approximately $22.967 m.

V. The issue of laches as it relates to Section "5C" must be considered in the context of the effect that the loss of Section "5C" would have on Sections "5A", "5B" and "5D".

VI. The balancing of the parties' respective interests and the possible injury and/or inconvenience to each must favor the defendants. [*Yakus* v. *U. S.,* 321 U.S. 414 (1944)].

VII. Plaintiffs have demonstrated no injury and/or inconvenience to themselves.

VIII. Plaintiffs are guilty of laches. [*Pennsylvania Environmental Council* v. *Bartlett,* 315 F. Supp. 238, aff'd 454 F. 2d 613 (1971); *Clark* v. *Volpe,* 342 F. Supp. 1324, aff'd 461 F. 2d 1266 (1972)].

IX. Plaintiffs have knowingly delayed filing this action until after the environment has been substantially altered.

X. Laches is a ground for dismissal of an action brought pursuant to NEPA. [*Clark* v. *Volpe,* 342 F. Supp. 1324, aff'd 461 F. 2d 1266 (1972)].

Exhibit A.

XI. The action should be dismissed based on plaintiffs' laches.

Dated: February 4, 1974.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Defendant Schuler

By s/ DOUGLAS S. DALES, JR.
Douglas S. Dales, Jr.
Assistant Attorney General

JOHN T. ELFVIN
United States Attorney in and for the Western District of New York
Attorney for Defendant Brineger

By s/ C. DONALD O'CONNOR
C. Donald O'Connor
Assistant U. S. Attorney

To: RICHARD J. LIPPES, Esq.
Attorney for Plaintiffs

Exhibit B, Environmental Reevaluation Supplemental Report.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ROYAL STEUBING, ET AL.,

Appellees,

V.

CLAUDE S. BRINEGAR, ET AL.,

Appellants

CERTIFICATE OF SERVICE

I certify that a printed copy of the Brief for the Federal Official has been served on counsel by placing same in the United States mail, postage prepaid, properly addressed, this 16th day of September, 1974, to:

Richard Lippes, Esquire
800 Western Building
Buffalo, New York 14202

Douglas Dale, Esquire
Office of the Attorney General
Albany, New York 12224

Edmund B.Clark,
Eva R. Datz,
Attorneys for Department of Justice
Washington, D.C. 20530

JOHN T. ELFVIN, Esquire
United States Attorney
Buffalo, New York 14202

Edward Rubin Vernon J. Leaken

EDITH P. RUBIN
Notary Public, State of New York
No. 41-4389250 - Qual. in Queens Co
Certificate filed in Queens County
Term Expires Mar 30, 19 75